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No. 12

IN THE

Supreme Court of the United States

October Term, 1951

FEDERAL POWER COMMISSION, *Petitioner*

v.

IDAHO POWER COMPANY

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR IDAHO POWER COMPANY IN OPPOSITION

A. C. INMAN
1220 Idaho Street
Boise, Idaho

LOUIS E. CHARNLEY, JR.
Reid & Priest
910 17th St., N. W.
Washington 6, D. C.
Of Counsel

HARRY A. POTH, JR.
Reid & Priest
910 17th St., N. W.
Washington 6, D. C.
Counsel for Respondent.

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BRIEF FOR IDAHO POWER COMPANY IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 65-73) is reported at 189 F. 2d 665.[1]

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on May 10, 1951. Acting upon Petitioner's Motion "For Clarification" of opinion and judgment, filed thereafter on July 16 (R. 74-5), the Court of Appeals on September 21 modified such opinion and judgment (R.

[1] "R" refers to the printed Joint Appendix; "Tr." refers to the original record on file with the Clerk.

76-7). By subsequent order, dated September 24, the certified copies of the opinion and judgment were recalled, and the Clerk of the Court of Appeals was directed to issue to Petitioner certified copies of the opinion and judgment as so modified (R. 77). Such certified copies also bear the original date and filing date of May 10, 1951.

The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act and 28 U.S.C. §1254(1), but Petitioner is barred by reason of its failure to file a timely petition for certiorari under 28 U.S.C. §2101(c).

Upon Petitioner's motion, the time for filing a petition for certiorari in this case, which otherwise would have expired on August 8, was extended for 59 days to October 6, by order of the Chief Justice on August 2 (R. 79). No further extension of the time to apply for certiorari was, or could have been, granted under 28 U.S.C. §2101(c). The Petition herein was filed on December 19, 1951, long after such extension of time had expired, and this Court is therefore without jurisdiction to entertain such Petition, unless a new period of 90 days commenced to run from September 21, 1951, the date on which the Court of Appeals modified its opinion and judgment of May 10.

A *timely* petition for rehearing tolls the running of a statutory limitation on the time to seek review since it operates to deprive a judgment of the finality which is essential to appealability. *Denholm & McKay Co.* v. *Commissioner of Internal Revenue*, 132 F. 2d 243, 247 (1st Cir. 1942). But this doctrine is only applicable where such petition seeks a "reconsideration of . . . basic findings . . . and the alteration of the conclusions of the court," so that if granted, "rights already adjudicated [will] be altered." *Leishman* v. *Associated Wholesale Electric Co.*, 318 U.S. 203, 205 (1943); *Cf. Zimmern* v. *United States*, 298 U.S. 167 (1936). Thus, it is well established that the re-entry of a final judgment with only formal changes not affecting any matter adjudicated does not enlarge the time to seek review. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Petitioner's Motion for Clarification was filed on July 16, 1951, 67 days after entry of the opinion and judgment and 52 days after expiration of the time for filing a petition for rehearing (Rule 26 of the General Rules of the U.S. Court of Appeals for the District of Columbia Circuit). Enlargement of the 15-day period within which to file petitions for rehearing can only be granted, after the expiration of such period, "for cause shown . . . where the failure to act was the result of excusable neglect", *id.* Rule 32(b). Petitioner's Motion did not set forth any "cause" for late filing, and since the Court's Order of September 21, 1951, is similarly devoid of any finding of "excusable neglect," it is apparent that neither the Court nor Petitioner considered the Motion to be a petition for rehearing authorized by Rule 26.[2] Cf. *United States* v. *Seminole Nation*, 299 U.S. 417, 420-21 (1937).

Moreover, the Motion did not request reargument or reconsideration by the Court of any substantive issue previously adjudicated. No error in the Court's conclusions of law was alleged, and no modification of any such conclusion was proposed. The Court was merely asked to *clarify*, or *restate in different language*, what it had already decided.[3]

It follows, therefore, that the Court's purely formal action in rewording the language of a portion of its opinion

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[2] Petitioner's failure to file 40 printed copies of its Motion for Clarification in the Court of Appeals, as required by Rule 26, constitutes further evidence that it did not consider such Motion a petition for rehearing.

[3] Here, as in *Department of Banking* v. *Pink*, 317 U.S. 264, 266, *supra*:

"... the motion did not seek a reargument or rehearing of any part of the case; *it was no more than a request that the Court of Appeals declare what had in fact occurred upon its previous decision of the case* . . .*

"... Unlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged . . ."

"Here no such alteration of the rights adjudicated was asked, and the finality of the court's first order was never suspended."

* Emphasis supplied throughout unless otherwise indicated.

and judgment did not operate to enlarge the time for filing a petition for certiorari in the instant case.

Even if the Motion were a "motion for reargument or rehearing" seeking "an alteration of the *rights* adjudicated,"[4] such Motion was untimely under the Court of Appeals Rule 26. Unlike a *timely* petition for rehearing, the filing of an *untimely* petition for rehearing does not enlarge the time for appeal, unless it is "entertained" by the court on its merits. *Pfister* v. *Northern Illinois Finance Corporation*, 317 U.S. 144 (1942); *Bowman* v. *Loperena*, 311 U.S. 262 (1940); *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498 (1927); *Morse* v. *United States*, 270 U.S. 151 (1926). The mere denial of such a petition, or even a consideration of whether the petition states grounds for the court to reconsider its prior conclusions, does not constitute "entertainment". Whether a petition was "entertained or considered on its merits . . . depend[s] upon what the order showed the court did," *Pfister* v. *Northern Illinois Finance Corporation, supra*, at p. 151.

Here the Court of Appeals, without opinion, merely amended the opinion and judgment *as of May 10, 1951* (like the original, the amended judgment bears the Clerk of the Court's stamp "Filed May 10, 1951"), entirely contrary to its normal practice in disposing of petitions for rehearing to enter an entirely new opinion and judgment, where modifications of substance have been ordered upon a reconsideration on the merits. See *Mayflower Hotel Stockholders Protective Committee* v. *The Mayflower Hotel Corporation*, ____ F. 2d ____ (D.C. Cir., No. 10745, November 29, 1951); where the court, presented with a matter of substance on a Motion for Clarification, dismissed the motion and, *sua sponte*, ordered a rehearing on the merits. Further, there is nothing in the record to indicate that the Court of Appeals ever reconsidered, as a proposition of law, its power to modify, and affirm as modified, Petitioner's original order. It therefore appears that Petitioner's Motion

[4] 317 U.S. 264, 266.

for Clarification, if it sought a readjudication on the merits, was never "entertained".[5] Thus, Petitioner has not sustained the burden of showing "affirmatively" that this Court has jurisdiction, *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 651 (1942) and *Lynch* v. *People of New York ex rel. Pierson*, 293 U.S. 52 (1934).

Here, Petitioner had 149 days to decide whether it would apply for certiorari. Hence, it can hardly be claimed that an additional period of 90 days was necessary to enable the "unsuccessful litigant to determine whether to seek further review," *Commissioner* v. *Bedford's Estate*, 325 U.S. 283, 288 (1945). For the foregoing reasons it is respectfully prayed that this Court deny the Petition herein for lack of jurisdiction.

QUESTION PRESENTED

Basically only a single question is presented by the Petition:

> Whether the action of Petitioner in requiring Respondent to agree—as a condition to a license under the Federal Power Act for a hydro-electric project—to permit various agencies of the Department of Interior to use the transmission lines, constituting a part of such project, for the transmission of Government power in competition with the Respondent, exceeds the authority granted by such Act, is arbitrary and unreasonable, and constitutes a taking of Respondent's property without due process of law.

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[5] In fact, it is highly doubtful whether, in the absence of the finding of "excusable neglect" required by the Court's Rule 32(b), the Court could have "entertained" the Motion. *Safeway Stores* v. *Coe*, 136 F. 2d 771 (D.C. Cir. 1943); *Jusino* v. *Morales & Tio*, 139 F. 2d 946 (1st Cir. 1944); *Nealon* v. *Hill*, 149 F. 2d 883 (9th Cir. 1945) *cert. denied*, 326 U.S. 753 (1945). The policy of these decisions—that limitations on the time for requesting relief authorized by rules of court must be strictly observed—is of particular significance today since the abolition of the "term of court" doctrine with respect to the finality of judgments, 62 Stat. 907 (1948), 28 USC §452 (1950 Supp.).

The additional question posed by the Petitioner of purported judicial usurpation of administrative discretion, in striking the offending conditions from the Federal Power Commission's order and affirming such order as so modified, is not reached for determination upon the facts in this case.

It is pointed out, however, that the action of the Court below, in modifying and affirming the Commission's order, was in strict accordance with its statutory power and jurisdiction under Section 313(b) of the Federal Power Act, which provides that "such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part."

STATUTE INVOLVED

The pertinent provisions of the only statute involved, the Federal Power Act (49 Stat. 863, 16 USC §791a *et seq.*), are contained in a pamphlet copy of such Act submitted with the Petition.

STATEMENT

Idaho Power Company is a Maine corporation, operating as a public utility in the States of Idaho, Oregon and Nevada, and is an electric "public utility" and a "licensee" as those terms are defined in the Act (Sections 201(e) and 3(5)). The Federal Power Commission is the administrative body entrusted with the administration of the Federal Power Act.

On August 22, 1947, the Company filed with the Commission an application, pursuant to Section 4(e) of the Act, for a license for the purpose of constructing, operating and maintaining a hydroelectric project on the Snake River in south central Idaho occupying, in part, lands of the United States (R. 12). Such project included a dam, power plant and *"transmission lines connecting with applicant's 138-kilovolt transmission system"* (*id.*). Such transmission lines, transmitting power from the power plant to the point

of junction with the Company's interconnected primary transmission system, are, under the definition contained in Section 3(11) of the Act, an essential and a required part of all licensed projects. The entire development was to be known as the Bliss Project, and was by the Commission designated as "Project No. 1975".

Construction of the dam and power plant was begun, upon pre-license consent of the Commission (R. 17), and on March 2, 1948, the Commission entered its Order (R. 12) authorizing the issuance of a major license for the Project, and reserving for determination "at a later date the question of what transmission facilities should be included in the license as part of the complete project" (R. 13). Such Order included the essential finding under Section 10(a) of the Act, that "Under present circumstances and conditions and upon the terms hereinafter imposed, the project is best adapted to a comprehensive plan for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes" (R. 13).

On April 20, 1949, the Company filed with the Commission its supplementary application (R. 17) to include as a part of such project two proposed high voltage (138,000 volt) primary transmission lines, approximately 73 miles and 116 miles long, and crossing, in part, lands of the United States, to connect with the Company's interconnected primary transmission system at Boise and American Falls, respectively, and to cost approximately $3,400,000 (R. 21). Neither line alone is capable of transmitting the entire power output of the Bliss plant, and consequently both must be used to transmit power away from the plant (R. 43), and thus are "primary lines" comprising a necessary part of a "project" (R. 46).

By reason of the urgent and immediate necessity for providing additional power for public use in the Bliss and Pocatello areas, the Company on April 26, 1949, applied for pre-license permission to proceed with construction of

the two 138-kilovolt lines. On May 2, 1949, the Commission notified the Company (R. 42) that such construction would not prejudice consideration by the Commission of the Company's application.

Shortly thereafter, the Department of the Interior, for the purpose of imposing upon the Company conditions similar to those contained in its new regulations, originally promulgated on October 14, 1948 (13 Fed. Reg. 6214), and amended July 18, 1949 (14 Fed. Reg. 4620), which purpose it could achieve only by forcing the Company to apply to it for a permit (43 CFR §§245.9 and 245.21), began an action to enjoin it from constructing the aforesaid transmission lines on the lands of the United States involved. This action was begun in the U. S. District Court for the District of Idaho in August 1949 (R. 42). And, following a trial on the merits, the injunction was denied by the District Court on September 30, 1949, *United States* v. *Idaho Power Co.*, 85 F. Supp. 913 (D. Idaho), *appeal dismissed*, 9th Cir., Feb. 13, 1950.

On October 13, 1949, the Commission entered its second order herein (R. 41), which includes the two 138 kilovolt transmission lines within the Project license. Among the new and additional terms and conditions contained in such order are those designated as Paragraph (F) thereof, comprising ten subparagraphs (R. 50-53), which is the subject of this proceeding for review. In substance Paragraph (F) requires, *inter alia*, that:

> (a) Upon request of the Secretary of the Interior, the Company shall, after notice from the Commission, convert, at the expense of the United States, its said 138 kilovolt transmission lines for operation at a voltage of 230 kilovolts;
>
> (b) The Company, either before or after any conversion of said lines to a higher voltage, shall permit any agency of the United States to interconnect any of its transmission facilities with such two transmission lines of the Company; and

(c) The Company, after such interconnection of its lines with transmission facilities of the United States, must permit transfer over such transmission lines of the Company of power and energy generated in power plants owned by the United States, in such amounts as will not unreasonably interfere with the Company's use of said lines. Such transmission capacity can be recovered by the Company, when needed for the requirements of its customers, only upon 24 months' notice (R. 64).

The above provisions and requirements of such Paragraph (F) are *specifically stated in the Commission's Order of October 13, 1949, to have been inserted therein at the request of the Secretary of the Interior* (R. 44). By order of January 18, 1950 (R. 61), the Commission made certain minor modifications in its order of October 13, 1949, including certain provisions of said Paragraph (F), but in no way materially altered the objectionable and unlawful provisions thereof, and thereupon denied the Company's Petition for Rehearing.

The subsequent proceedings in the Court of Appeals are as stated at p. 5 of the Petition for Certiorari and above in this brief under the caption "Jurisdiction".

SUMMARY OF ARGUMENT

As we have said above, basically only one question is presented for decision—can the Commission lawfully impose the conditions complained of? The additional question posed by the Petitioner, of purported judicial usurpation of administrative discretion, is not reached for determination upon the particular facts in this case. Here the Commission in its original determination of March 2, 1948, made all the findings required to support the order, including the determination that the Bliss project as a whole "is best adapted to a comprehensive plan for the improvement and

utilization of water power development", and that Respondent had complied with all requirements of the Act prerequisite to securing a license (Tr. 87-91 and R. 45). The conditions complained of, conceived and dictated, not by the Commission, but by the Secretary of the Interior, can in no way alter or recall the finality of the Commission's original determination. In consequence the order here under review still stands as a valid and complete instrument under the statute authorizing its issuance, although modified by the deletion of Paragraph (F) therefrom.

If usurpation of administrative discretion there be, the usurper is the Secretary of the Interior and not the court below. In every case relevant to this question cited in Petitioner's brief the factual situation was entirely different. In none of the cases does it appear (as it does here) that the administrative agency involved would have acted as it did absent the qualifying provisions stricken by the appellate tribunal. Here the Court of Appeals took the Commission at its word that this project was "best adapted to a comprehensive plan" under Section 10(a) of the Act, and affirmed the Commission's order issuing the license, without in any way attempting to substitute its judgment for that of the Commission or to exercise an administrative function, and in strict accordance with the "exclusive jurisdiction", specifically conferred by Section 313(b) of the Act, "to affirm, modify, or set aside such order in whole or in part."

The decision below is clearly correct. The legislative history of the Act clearly shows that Congress on two occasions, once in 1919 and again in 1935, specifically considered and flatly rejected proposals granting to the Commission the authority here sought to be exercised, and that on the last occasion a new subsection was added to the Act specifically to prevent the Commission from compelling private utilities to establish connection or exchange power with public plants. In short, the opinion below most properly followed the principle established by this Court that admin-

istrative action taken "to achieve that which Congress has refused to enact into law cannot be sustained",[6]

The Petitioner's brief makes clear that the moving party here is not the Commission but the Secretary of the Interior, and that the fundamental issue it seeks to reach is not the extent of the Commission's authority under the Federal Power Act but that of the Secretary under the Act of March 4, 1911. This is the precise question now awaiting trial in the United States District Court for the District of Columbia in *Idaho Power Company* v. *Oscar L. Chapman* (Civil Action No. 4540-50).

There is no conflict, on the facts in this case, with any decision of this Court, or of any other Federal court. On the contrary, it is plain that the decision below is in complete harmony with the views expressed by this tribunal. Manifestly, there is no important question of Federal law requiring decision at this time by this Court. No erosion of the statute involved has, nor can, occur, nor will the Federal Government be hampered in the proper exercise of its functions, by reason of the decision below. All that Respondent seeks is to halt an unlawful attempt to extend the regulatory powers of the Petitioner, who has a complete remedy in the Congress if it believes the authority sought should be delegated.

ARGUMENT

I. Only One Question is Reached for Determination on the Facts of This Case — The Authority of the Federal Power Commission Under the Act to Impose the Conditions Complained of.

Replying to Petitioner's brief in the order of its presentation we meet first the extraordinary statement (p. 11) that the Commission "has not had the opportunity to decide whether the project will fulfill the Act's commands if this significant condition [i.e. "to carry Government power over

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[6] *Colgate-Palmolive Peet Co.* v. *National Labor Relations Board*, 338 U.S. 355, 364 (1949).

its project lines"] is eliminated." That is not so. Respondent in its original application filed on August 22, 1947, sought a license for a project consisting of a concrete dam, creating a reservoir extending upstream approximately 5 miles, a 69,000-kilowatt power plant integral with the dam, with transformers, switch yard, transmission lines connecting with applicant's 138-kilovolt transmission system, and appurtenant works (R. 12). All that was absent from the application were the technical details and drawings showing the specifications and locations for the lines to connect with the Respondent's transmission network (*id.*).

The Commission ascertained that the Public Utilities Commission and the Department of Fish and Game of Idaho had no objection to the project, and received a favorable report from the Corps of Engineers and, most interestingly, from the Assistant Secretary of the Interior, who, by letter of February 19, 1948 stated that "*The Department has no objection to the issuance of a license to the Idaho Power Company for its proposed Bliss Project, provided the recommendations*[7] *set forth are followed* and provided further that full provision is made for the carrying out of the recom-

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[7] The "recommendations" referred to in the Assistant Secretary's letter were as follows:

"(1) That the license be conditioned upon the applicant's starting construction work within one year from the date of issue of the license and upon completing construction of at least the initial generating unit *together with the necessary transmission lines* and appurtenant works within five years of the date of the license.

(2) That, should the applicant determine it is damaged by subsequent upstream diversion of water by the United States in connection with its irrigation and conservation program, then the United States Government has the option, in full settlement of any and all claims by the applicant,

(a) of paying such damages as the applicant shall be then entitled to recover as a matter of law; or

(b) of acquiring the applicant's plant at its depreciated cost."

No mention of "wheeling" or transmission of power for the government was made or even suggested in the Assistant Secretary's letter.

mendations of the Fish and Wild Life Service which will be sent you at a later date." (R. 11).

Considering this record of approval by other interested agencies, including the Department of the Interior, the Commission in due course issued its order authorizing the issuance of a license for the project, and made all of the basic findings[8] required by the Act.

All that was said with respect to transmission lines, in conformity with the Commission's usual practice,[9] was that "It is desirable to reserve for determination at a later date the question of what transmission facilities should be included in the license as part of the complete project." (R. 13). It was not until several months after Respondent designated these lines as the transmission lines leading from the Bliss project that the Commission, on August 16, 1949, advised the Respondent of the Interior's request that its recently conceived regulations (first promulgated on October 14, 1948, 13 Fed. Reg. 6214, and sweepingly amended on July 18, 1949, 14 Fed. Reg. 4620)[10] be included in the terms of

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[8] The Commission found, *inter alia* (R. 13-14), that:

"(13) The project does not affect any Government dam, nor will the issuance of a license therefor as hereinafter provided affect the development of any water resources for public purposes which should be undertaken by the United States itself.

(14) The issuance of a license as hereinafter provided will not interfere or be inconsistent with the purposes of any reservation or withdrawal of public lands of the United States.

(15) Under present circumstances and conditions and upon the terms hereinafter imposed, *the project is best adapted to a comprehensive plan for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes,*"

[9] See *Thirtieth Annual Report of the Federal Power Commission* (1950), pp. 162, 171 and 174.

[10] Parenthetically we point out that the purported regulations of the Secretary of the Interior set out in the Appendix to the Petitioner's brief are not those in effect at the present time (or since July 18, 1949), but the original text first issued on October 14, 1948. The current and greatly expanded regulations are set forth in Appendix A to this Brief. Their validity is the subject of the pending litigation referred to, *infra*, page 19.

the license *already authorized* (R. 25). The Department's request was made despite the fact that on February 19, 1948, it had advised the Commission that it had no objection to the issuance of a license for the Bliss project, provided that the totally unrelated recommendations then proposed were followed (See footnote 7, p. 12, *supra*).

The time sequence, alone, establishes conclusively that on March 2, 1948, when it authorized the Bliss project, the Commission could have had no thought in its mind of imposing the conditions herein complained of, as their prototype was not even established as a regulation of the Department of Interior until seven months later, on October 14, 1948. The inference that the Commission could have antecedently conceived of these conditions, independent of the Interior's regulations, is completely negated by the facts that its second order specifically states that the conditions of Paragraph (F) were "requested" by the Secretary of the Interior (R. 44, and see R. 33-38), and that the language, form and content of the conditions are obviously patterned on paragraph (v) of 43 CFR § 245.21, following the sweeping changes of July 18, 1949, set forth in Appendix A hereto. Further, in the more than 2,000 project licenses[11] issued by the Commission over the thirty-odd years of its existence, never have conditions been imposed even remotely resembling those complained of here.

It is thus apparent that the Commission's finding that the Bliss project was "best adapted" to the statutory policy declared in Section 10(a) was in no way dependent upon the subsequent insertion in the license of the illegal condi-

[11] See *Thirtieth Annual Report of the Federal Power Commission (1950)*, p. 194. Pages 161-183 of this Report also well illustrate the standard pattern of terms and conditions imposed in licenses by the Commission at the time of, and subsequent to, the issuance of the license in this case, relating generally to conservation measures, restrictions on slashing of timber, prevention of fire hazards, use of the project area for public recreational purposes, and similar matters.

tions complained of. The statement (Pet. Br. p. 11) that "The Commission has determined that the Bliss project will conform with these statutory standards [only] if the company is required as part of its license, to carry government power over its project lines" is obviously without foundation.

The foregoing, coupled with the tone and content of the Petitioner's entire brief, also makes abundantly clear that the moving party in this case is the Secretary of the Interior and not the Federal Power Commission, the names of whose counsel, oddly enough, appear nowhere in the Petition and Brief. A stranger to this litigation reading, for example, the argument of Petitioner's Brief at pp. 14-23, entirely aside from the fact that it contains matters not in the record, would be at a considerable loss to understand why the Federal Power Commission is designated as the Petitioner; particularly in light of the extraordinary statement (p. 14) that: "Acquiescence by the Secretary of the Interior in the jurisdiction of the Commission and in the issuance of the license resulted from imposition of the condition in question." *Obviously the jurisdiction of the Commission, an independent agency created by statute, is in no way dependent on the "acquiescence" of the Secretary or of any other governmental agency, but solely on what has been enacted by Congress in the Federal Power Act.*

The only possible connection the Secretary has with this case lies in the fact that Section 4(e) of the Act provides:

> "That licenses . . . issued within any reservation . . . shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the *adequate protection and utilization of such reservation.*"

Here, of the total 189 miles of transmission line involved, 98 miles cross open public land. Only 27 miles are within

reservations of the United States, and these are not National forests, parks, monuments or other similar reservations, but merely reclamation withdrawals (under the Reclamation Act of June 17, 1902, 32 Stat. 388), whose use would be wholly unaffected by the mere erection of transmission lines. No part of the Bliss dam, power plant, or reservoir is within a reservation of the United States under the "supervision" of the Secretary. The short answer is, of course, that the Secretary has no possible authority under the Federal Power Act to propose the conditions complained of (R. 50-53), as *they have no relation whatever to the "protection and utilization of such reservations"* (See, R. 22). If any usurpation of administrative discretion there be, the usurper is the Secretary of the Interior in thrusting conditions, unauthorized by the Act, upon the Commission, which has very pointedly disclaimed authorship of the stricken portion of its order, *which consists solely of the conditions requested by the Secretary* (R. 44).

It is therefore clear that the additional question raised by the Petition is not reached for determination and that the cases cited therein on that subject have no application to the particular facts of this case.

Certainly, where Congress has delegated authority to an administrative agency to regulate and determine matters relating to a particular segment of the economy, it is not within the province of the judiciary to usurp the agency's authority by attempting to regulate and determine such matters itself. This is all that was decided in the first group of cases cited at page 12 of the Petitioner's Brief.[12] Likewise, where a reviewing court determines that an administrative order cannot be upheld because an essential finding of fact upon which the order must be based has not been made, the reviewing court is powerless to supply the miss-

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[12] *General American Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940); *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District*, 304 U.S. 295 (1938); *Southern Ry. Co.* v. *Tift*, 206 U.S. 428 (1907).

ing finding and must remand the case to the agency for further administrative action. Such is the rule laid down by this Court in the next group of cases cited by Petitioner at page 12 of its Brief.[13] Here the record is complete and no further administrative findings are necessary for the purpose of determining that the statutory criteria for the issuance of a license have been satisfied.

Nor does the action of the Court of Appeals in modifying and affirming the Commission's order conflict in any way with *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948) and *Addison* v. *Holly Hill Co.*, 322 U.S. 607 (1944), also cited by Petitioner at page 12. In both of these decisions, a part of one paragraph of an administrative order or regulation was found to be invalid, while the remainder of the paragraph was sustained. In each instance it was assumed that the agency involved might not have issued the valid part of the contested paragraph by itself if it had realized initially that the invalid segment was in excess of its statutory authority. Accordingly, the Court acknowledged the agency's power to conduct further proceedings for the purpose of determining how the contested paragraph should be redrafted. However, such decisions clearly presupposed that the administrative body had been authorized by Congress to promulgate in some

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[13] *Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946); *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (1933); *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364 (1939); *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). For example, in the *Pottsville* case, 309 U.S. 134, 145: "The Commission originally found Respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania." Having determined that the Commission had committed an error of law in denying the license application, the Court could not further direct the issuance of a license, since the requisite finding of public convenience and necessity had never been made by the agency. And as stated by this Court in the *Ford Motor Co.* case, *supra*, at p. 373: "while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action."

form an order or regulation dealing with the general subject matter of the contested paragraph.

In marked contrast, the decision of the Court of Appeals here specifically holds that the Federal Power Act "cannot be construed to require the interconnection of private facilities with public facilities and the compulsory transmission of public power by a private company; in view of the fact *that Congress specifically forebade such interconnection in the Part of the statute which deals with this subject,*" 189 F. 2d 665, 670. Thus, in view of the result reached by the Court, it would have been an idle gesture to remand the case for further proceedings to determine what conditions, relating to the use of such transmission facilities by the Federal government, might have been substituted in the license in place of Paragraph (F), as the court had already determined that the Commission had no authority to act within that field. In consequence, the order here under review still stands as a valid and complete instrument under the statute authorizing its issuance, although modified by striking Paragraph (F) therefrom.

Finally, Section 313(b) of the Federal Power Act, in providing for the review of orders of the Commission, expressly provides that the Federal Courts of Appeals "shall have exclusive jurisdiction to affirm, modify, or set aside such orders in whole or in part." Had Congress desired to confine the reviewing courts' authority to merely affirming or setting aside Commission orders it could have so limited its grant of power, as it did in enacting the Communications Act of 1934 (48 Stat. 926, 47 U.S.C. § 402(e)). Instead, such courts were empowered not only to affirm or set aside, but also to "*modify * * * in whole or in part.*" The plain meaning of statutory language cannot be disregarded, and under similar statutes the power has been frequently exercised.[14] Therefore, viewed against the factual background of the instant case, the Court's procedural mandate was not only proper but manifestly requisite.

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[14] *Alberty* v. *Federal Trade Commission*, 182 F. 2d 36 (D.C. Cir. 1950) *cert. denied*, 340 U.S. 818 (1950); *Gimbel Bros.* v. *Federal Trade Commis-*

II. The Merits of the Public Power Program and the Authority of the Secretary of the Interior Under Other Statutes are Not at Issue Here.

In attempting to enlarge the litigation here into an important federal question, the brief of the Solicitor General makes proof conclusive that the voice is the Federal Power Commission's voice but the hands are the hands of the Secretary of the Interior. The detailed exposition of the public power program of the Federal Power Government (Pet. Br. pp. 18-21), based on facts entirely *dehors* the record, is as irrelvant to the issue here as the discussion of the authority of the Secretary under the Act of March 4, 1911 (Pet. Br. pp. 21-23).

The Act of March 4, 1911 and the regulations of the Secretary of the Interior promulgated thereunder (43 C.F.R. §245.21) are the statute and regulations now at issue in *Idaho Power Company* v. *Oscar L. Chapman*, (Civil Action No. 4540-50) in the United States District Court for the District of Columbia. This declaratory judgment action was brought to have declared the invalidity of subsections (r) and (v) of such Section 245.21 on the grounds, *inter alia*, that they are in excess of the Secretary's statutory authority, constitute attempted legislation, and are arbitrary, capricious and unreasonable. Such cause has been heard at pre-trial and set for trial in the District Court on March 6, 1952. The Petitioner's attempt to pre-try that cause in this forum is patently improper and premature. The issue here is the extent of the Commission's authority under the Federal Power Act.

In passing we point out, however, that Petitioner is inaccurate even in its irrelevancies. Petitioner's brief states

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sion, 116 F. 2d 578 (2d Cir. 1941); *Educators Ass'n.* v. *Federal Trade Commission*, 108 F. 2d 470 (2d Cir. 1939), *decision modified*, 118 F. 2d 562 (2d Cir. 1941); *Belmont Laboratories* v. *Federal Trade Commission*, 103 F. 2d 538 (3d Cir. 1939); and *National Labor Relations Board* v. *U. S. Truck Co.*, 124 F. 2d 887 (6th Cir. 1942).

(p. 18) that "The construction of power plants by the United States was more or less limited until the past decade," and that "The recent development of the public power program explains the absence of conditions for wheeling in earlier licenses granted by the Commission." The facts are to the contrary.

The Annual Report of the Secretary of the Interior (1950), cited at page 20 of Petitioner's Brief, shows (pp. 49-51) that of the 3,312,267 kilowatts, of installed generating capacity of the public power projects there listed as being in operation on June 30, 1950, 2,818,167 kilowatts, or approximately 85%, was installed in 1942 or earlier. As the tabulation indicates, the great surge in the kilowatt installation of public power projects came in the years 1935-1942, and therefore such projects were *authorized* at the time when Congress deliberately considered, and withheld from the Commission, the power herein claimed. In fact, as Petitioner's Brief inadvertently points out (pp. 18-19), two of the largest public power plants, Bonneville and Grand Coulee, were authorized in 1935, the exact year in which Congress added Section 201(f) to the Federal Power Act and categorically stated its intention with respect to the issue here (see page 23 *infra*). The third major unit, Hoover Dam, was authorized by the Act of May 29, 1928, c. 918 (45 Stat. 1011).

Respondent has no means of knowing what Federal and "non-Federal developments" are involved in the vague reference to "proposed interconnections," at page 19 of Petitioner's brief. But such statement, and the statement at page 21, that "such [wheeling] arrangements *will be desirable*", have no bearing upon the issue here, nor can they enlarge the power and authority of either the Secretary or the Commission. *Cf. Morrill* v. *Jones*, 106 U.S. 466, 467 (1883).

We do point out, however, that Respondent has for more than 30 years engaged with the Bureau of Reclamation in "wheeling" power generated at dams of the Federal Gov-

ernment over its transmission lines, *on a contract basis*, But when, through the device of conditions to a license or permit, the Federal Government places a pistol at the Company's head and, in effect, says "This is your contract, sign it," the victim cannot very well be accused of a failure to cooperate.

Further, as we have pointed out above, Petitioner's purported summarization (p. 22) of the provisions of 43 C.F.R. §245.21(v) is inaccurate and misleading as the quotation is from the original version of the regulations, and does not reflect the sweeping changes effected by the amendment of July 18, 1949, set out in Appendix A hereto.

In sum, the answer as to why "wheeling" provisions have never been suggested before as conditions to Federal Power Commission licenses during the 30 years of that agency's existence is not that public power, in 1949, was a new and novel concept, but more obviously a perverse application of a much older concept that "a man's reach should exceed his grasp." Thus we must apply the rule laid down by this Court in *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941):

> "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred".[15]

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[15] See also *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 (1949) where this Court said:

> "Thus for over *ten years* the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed."

III. The Decision Below is Clearly Correct.

Adopting the Solicitor General's view of the question of federal law here involved, "the problem of statutory interpretation assumes" (Pet. Br. p. 23), on the facts of this case, a very minor importance. And it is abundantly clear that the interpretation of the Federal Power Act by the Court of Appeals was entirely correct from any point of view.

Petitioner's only arguments on the merits are that the prohibitions of Part II of the Federal Power Act do not apply to the issue of licenses under Part I, and that "The decision below would convert the limited grant of additional power [under Part II of the Act] into the repeal of authority previously enjoyed." (Pet. Br. p. 30). The first contention was specifically considered and rejected by the unanimous opinion below; the latter assertion completely overlooks the legislative history of the earlier Federal Water Power Act, which is now Part I of the Federal Power Act. During the debate in 1919 upon the bill (H.R. 3184) which became the Federal Water Power Act, the same "common carrier" concept proposed and rejected in the 1935 amendments,[16] was advanced and also rejected at that

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[16] All of the "common carrier" provisions (Hearings before House Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess., p. 531) of the original Wheeler-Rayburn bills, which in 1935 added Part II of the Federal Power Act (S. 1725 and H.R. 5423, 74th Cong., 1st Sess.), were entirely eliminated upon the enactment of the statute. The final Senate Committee Report states (Senate Report No. 621 to accompany S. 2796, 74th Cong., 1st Sess., May 13, 1935, p. 19):

> ". . . Section 202(a) of S. 1725 imposed upon each public utility the duty to furnish energy to exchange energy with and transmit energy for *any person* upon reasonable request. This provision has been eliminated . . . . While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. . . . Furthermore, the provisions of the old section 203(b), empowering the Federal Power Commission to require one utility to permit the use of its facilities by another, or to make extensions or improvements have been eliminated; *these matters are left to the voluntary action of the utilities.*"

time.[17]

It is therefore clear that even if Part I be considered as independent of Parts II and III of the Federal Power Act, Congress has already expressed its intent to prohibit the Federal Government, in the circumstances that exist here, from requiring licensees (the only utility companies subject to Part I) to transmit power for *anyone*.

Of even greater significance is the fact that in 1935 Congress specifically considered whether the Commission should have the power to require "private companies", and not specifically "public utilities" as defined in the Act (see Hearings before House Committee on Interstate Commerce on H.R. 5423, 74th Cong., 1st Sess., pp. 514-15, 546 and 549), to transmit public power. As the DeVane testimony indicates (Pet. Br. pp. 27-28), this controversial subject was considered at great length before the Committee. And such requirement was specifically prohibited by the addition of a new subsection to the Act, 201(f), as is made clear by the final Senate Report relating thereto.

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[17] Representative Mays proposed the following amendment to H.R. 3184 (58 Congressional Record, 66th Cong., 1st Sess., (1919), p. 2136):

> "(g) That all transmission lines constructed or operated under authority of this act shall be constructed, operated, and maintained as *common carriers*."

There followed the colloquy below between Representative Mays and Representative Esch (*ibid.* p. 2137):

> "Mr. Mays: Why do you make railroads common carriers and why do you make pipe lines common carriers?
>
> "Mr. Esch: We have made both of those common carriers because they entered into interstate commerce. But the *theory of this bill is to allow the State regulatory body to have control over* the rates, the securities, and other features of the *transmission lines and power developments within the State*, and it is only where the current is interstate and where the State commissions cannot agree, or where there is no commission, that we give this commission the powers that are granted to the Interstate Commerce Commission."

The Mays amendment was overwhelmingly defeated. (*ibid.*)

The Report (No. 621, 74th Cong., 1st Sess., May 13, 1935, p. 19) states:

> "Despite repeated assurances by representatives of the Federal Power Commission that no such authority was intended, the charge was frequently made that *the bill as originally introduced authorized the Commission to compel private utilities to establish connection or exchange power with public plants.* This new subsection carries out in unmistakable terms the original intention of the bill in this respect."

It is obvious that if Congress had intended in 1935 to grant so far reaching a power to the Commission with respect to licensees under Part I, specifically denied by the defeat of the Mays' amendment in 1919, it would have done so directly, as it did, at the same time, in amending the Mineral Leasing Act (41 Stat. 449, 30 U.S.C. § 185). The amendments to this act, approved *five days prior* to the signature of the Public Utility Act of 1935, on August 26, 1935, added the specific requirement that pipe line companies crossing the public lands "shall accept, convey, transport * * * oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may * * * determine to be reasonable" (Act of August 21, 1935, c. 599, § 1, 49 Stat. 687).

Further, Congress took pains to correlate Parts I and II of the Act in the 1935 amendments by substituting "this Part" for "this Act" in the base sentence of Section 10 of Part I, but left unchanged the restriction contained in subsection 10(g), which provides "Such other conditions not inconsistent with the provisions *of this Act* as the Commission may require." It is therefore plain that Petitioner is specifically limited, in imposing conditions to licenses under Part I, by the restrictions on its power contained in Part

II, and that it may not divide the Act into mandates to be separately applied as its desires of the moment dictate.[18]

In substance then the Petitioner seeks to abrogate the rule laid down by this Court in *Colgate-Palmolive Peet Co.* v. *National Labor Relations Board*, 338 U.S. 355, 364 (1949) that administrative action taken "to achieve that which Congress refused to enact into law cannot be sustained." If it is "desirable" that Petitioner have authority to force licensees, as the price for a license under the Federal Power Act, to transmit power generated by Government plants, without their consent, Congress should be asked to make provision to that effect instead of Petitioner's seeking to extend the ambit of its authority through the guise of "conditions" to a license.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

A. C. INMAN,

HARRY A. POTH, JR.,
Counsel for Respondent.

LOUIS E. CHARNLEY, JR.,
Of Counsel.

February 1952

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[18] See also *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 179 F. 2d 179, 185 (footnote 10), *cert. denied*, 339 U.S. 957 (1959), where the Third Circuit pointed out:

> "Section 212 of the Public Utility Act of 1935, 49 Stat. 847, specifically provides that 'Section 1 to 29 incl. of the Federal Water Power Act, as amended, shall constitute Part I of [The Federal Power Act] . . .' Section 213 provides that 'The Federal Water Power Act, as amended, *is further amended by adding thereto the following parts* . . .' There follows Parts II and III being specifically designated in Section 320 as the 'Federal Power Act.'"

APPENDIX A

Excerpt from 14 Federal Register 4620
(July 23, 1949)

TITLE 43—PUBLIC LANDS: INTERIOR

CHAPTER 1—BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR

Part 245—Rights-of-Way Over and Upon Public Lands and Reservations of the U. S. for Electrical Plants and Transmission Lines

Stipulation Required as Condition Precedent to Approval of Permit

Paragraph (v) of § 245.21, as amended on October 14, 1948 (13 F. R. 6214), is revised to read as follows:

§ 245.21 *Stipulation required as a condition precedent to the approval of permit.* * * *

(v) To allow the Department of the Interior, in the case of a permit or an easement applied for on or after October 14, 1948, and covering a right-of-way for an electrical transmission line having a voltage of 33 kv. or more, (1) to utilize for the transmission of electrical power any surplus capacity of the line in excess of the capacity needed by the holder of the permit or easement (subsequent referred to in this paragraph as "the permittee") for the transmission of electrical power in connection with the permittee's operations, or (2) to increase the capacity of the line at the Department's expense and to utilize the increased capacity for the transmission of electrical power. Utilization by the Department of surplus or increased capacity shall be subject to the following terms and conditions:

(i) When the Department desires to utilize surplus capacity thought to exist in a line, notification will be given to the permittee and the permittee shall furnish to the Department within 30 days a certificate stating whether the line has any surplus capacity not needed by the permittee for the transmission of electrical power in connection with the permittee's operations, and, if so, the extent of such surplus capacity.

(ii) In order to utilize any surplus capacity certified by the permittee to be available, or any increased capacity provided by the Department at its own expense, the Department may interconnect its transmission facilities with the permittee's line in a manner conformable to approved standards of practice for the interconnection of transmission circuits.

(iii) The expense of interconnection will be borne by the Department, and the Department will at all times provide and maintain adequate switching, relaying, and protective equipment so as to insure that the normal and efficient operation of the permittee's line will not be impaired.

(iv) After any interconnection is completed, the permittee shall operate and maintain its line in good condition; and, except in emergencies, shall maintain in a closed position all connections under the permittee's control between the permittee's line and the interconnecting facilities provided by the Department.

(v) The interconnected power systems of the Department and the permittee will be operated in parallel.

(vi) The transmission of electrical power by the Department over the permittee's line will be effected in such manner and quantity as will not interfere unreasonably with the permittee's use and operation of the line in accordance with the permittee's normal operating standards, except that the Department shall have the exclusive right to utilize any increased capacity of the line which has been provided at the Department's expense.

(vii) The permittee will not be obligated to allow the transmission over its line by the Department of electrical power to any person receiving service from the permittee on the date of the filing of the application for a permit or easement, other than persons entitled to statutory preference in connection with the distribution and sale of electrical power by the Department.

(viii) The Department will pay to the permittee an equitable share of the total monthly cost of maintaining and operating the part of the permittee's line utilized by the Department for the transmission of electrical power, the payment to be an amount in dollars representing the same pro-

portion of the total monthly operation and maintenance cost of such part of the line as the maximum amount in kilowatts of the power transmitted on a scheduled basis by the Department over the permittee's line during the month bears to the total capacity in kilowatts of that part of the line. The total monthly cost may include interest and amortization, in accordance with the system of accounts prescribed by the Federal Power Commission, on the permittee's net total-investment (exclusive of any investment by the Department) in the part of the line utilized by the Department.

(ix) If, at any time subsequent to a certification by the permittee that surplus capacity is available for utilization by the Department, the permittee needs for the transmission of electrical power in connection with its operations the whole or any part of the capacity of the line theretofore certified as being surplus to its needs, the permittee may modify or revoke the previous certification by giving the Secretary of the Interior 30 months' notice, in advance, of the permittee's intention in this respect. After the revocation of a certificate, the Department's utilization of the particular line will be limited to the increased capacity, if any, provided by the Department at its expense.

(x) If, during the existence of the permit or easement, the permittee desires reciprocal accommodations for the transmission of electrical power over the interconnecting system of the Department to its line, such reciprocal accommodations will be accorded under terms and conditions similar to those prescribed in this paragraph with respect to the transmission by the Department of electrical power over the permittee's line.

(xi) The terms and conditions prescribed in this paragraph may be modified at any time by means of a supplemental agreement negotiated between the permittee and the Secretary of the Interior or his designee.

(31 Stat. 790, 791 as amended; 43 U. S. C. 959, 961)

[SEAL] J. A. KRUG,
Secretary of the Interior.

JULY 18, 1949.

[F. R. Doc. 49—6033; Filed, July 22, 1949; 8:45 a. m.]